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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-304

ROCCO CIANCIOTTI, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioners, Rocco Cianciotti, Jr., Robert L. Douglas, William E. Goulart, Finis H. McGraw, Charles D. Mundy, Ronald S. Taylor and Frank D. Tucci, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit reversing the order of the United States District Court for the District of Columbia dismissing all conspiracy and false statement charges against the seven (7) Petitioners.

OPINIONS BELOW

The oral opinion of the trial court dismissing all conspiracy and false statement charges against Petitioners and the subsequent written Order to the same

effect are not officially reported and are reprinted in the Appendix of this petition at p. 1a. The judgment of the United States Court of Appeals for the District of Columbia Circuit reversing the Order of the District Court is not officially reported and is reprinted in the Appendix of this petition at p. 10a. A Petition for Rehearing, Rehearing En Banc was denied on July 16th, 1973, and is reprinted in the appendix at page 13a.

STATEMENT OF THE CASE

On January 21, 1972 a twenty count indictment was returned in Criminal No. 150-72 against Lieutenant Harold Crook, (not a Petitioner) and seven officers of the Metropolitan Police Department who are the instant Petitioners. The first count charged a conspiracy to make false arrests, submit false statements, and to commit perjury with respect to the arrest of eight individuals for soliciting either for prostitution or for lewd and immoral purposes. The conspiracy was alleged to have occurred during the period January 21 through July 30, 1971. Eight of the substantive counts charged violations of 18 U.S.C. § 1001 and concerned allegedly false prosecution reports, and eleven counts charged perjury committed in the Superior Court of the District of Columbia in violation of D.C. Code § 22-2501. Crook was also indicted separately in Criminal No. 151-72 for committing perjury before the Grand Jury which returned the indictment in Criminal No. 150-72 against him and the seven officers.

The Petitioners were arraigned on February 10, 1972, and trial was scheduled for June 12, 1972; on March 22 an omnibus hearing was held, motions were heard and ruled upon, preliminary pretrial confer-

ences were scheduled for May 16 and June 5, and a pretrial order was entered scheduling the exchange of documents and the filing of stipulations, all toward meeting the June 12 trial date. Administrative action by the Metropolitan Police Department against some Petitioners had been taken as early as July 1971, and by the time the indictment was returned all had been suspended from the Department without pay. On May 3, 1972, shortly before a scheduled pretrial, the Government moved for a continuance of the trial due to the illness of its chief investigator and not an "important witness" as stated by the Court of Appeals. Trial was rescheduled for September 11, 1972, and pretrial conferences were set for July 28 and September 5.

In June 1972 the Government initiated a series of secret meetings with Crook designed to obtain his cooperation in an investigation of a criminal matter totally unrelated to this case. (Tr. Oct. 25, 1972, p. 13.[1] Counsel for Petitioners were unaware of these meetings, and in July, again without knowledge of counsel for petitioners, the United States Attorney and counsel for Crook met with the trial court in chambers without a stenographer. The Government advised the court of Crook's cooperation and of the desire of the United States Attorney to continue the trial of Petitioners' case to enable the Government to use Crook in investigation of the unrelated criminal case. (Tr. Oct. 25, 1972, pp. 13, 20-22). The trial court made no commitment with respect to the continuance of the trial date and specifically advised the United States Attorney that any delay of the trial was something with which he had to deal. The court further cautioned the United States Attorney that to obtain

[1] References to Transcripts state the date and page number.

a continuance, he would probably have to promptly disclose the cooperation of Crook. (Tr. Oct. 27, 1972, pp. 8-9) No continuance was requested by the United States Attorney at this conference and none was granted.

The morning of the pretrial on July 28th the United States Attorney made the following representation:

> "Your Honor, may it please the Court, in preparing for this hearing today, the Government has discovered that the present indictment is at variance with what our proof would show at trial. Due to this defect, it will be necessary for the Government to re-present this matter to the grand jury. The Government will begin this re-presentation process immediately—with the full expectation that the grand jury will return an indictment or indictments against each of the Defendants.
>
> As soon as the Government learned of this problem, we notified each of the Defendant's attorney in order to save them whatever work we could in preparation for this hearing today.
>
> Since it would serve no purpose to proceed with the originally-scheduled matters in the hearing today, the Government requests that this matter be continued until September 11, 1972, at which time the Government expects to present to this Court superseding indictments against these Defendants." (Tr. Jul. 28, 1972, pp. 2-3)

The Government did not advise Petitioner's counsel for the trial court that its real purpose in seeking a delay of the trial was that Crook's cooperation was continuing and the United States Attorney needed additional time to complete his investigation. (Tr. Oct. 25, 1972, pp. 20-22; Oct. 27, 1972, pp. 8-9). Counsel for Petitioner's vehemently objected to this second con-

tinuance sought by the Government and pointed out to the court that Petitioners had suffered all of the infirmities and indignities of police officers under suspension or indictment (some for as long as one year) and that based upon the Government's representation that the indictment was at variance with its proof, they were entitled to have the indictment dismissed. (Tr. Jul. 28, 1972, pp. 2-10) The court accepted the Government's representations, denied the motion to dismiss, set aside the trial date, and continued the case to September 11 to permit the Government to obtain new indictments. (Tr. Jul. 28, 1972, p. 11) As the court and counsel were later to learn, the Government had been insensitive to the rights of Petitioners for a speedy trial and devious in its representations as to the reason for the delay. On September 11, after the new indictments were returned, the court immediately noted that although the United States Attorney had represented in July that he could not proceed and establish the conspiracy for which Petitioners were previously indicted, the new indictments were no more than a restatement of the same conspiracy, and the court seriously considered dismissing the conspiracy count as to all defendants. (Tr. Sept. 11, 1972, pp. 7-11) Subsequently it was learned that no new evidence had been presented to the Grand Jury.

The court noted that the original and superseding indictments were in all essential respects the same. (Tr. Sept. 12, 1972, p. 7) The superseding indictment in Criminal No. 1795-72 charged all of the defendants, except Crook, with the very same charges as set forth in the original indictment. There were three differences: (1) Crook was not a defendant; (2) three meetings which Crook was alleged to have held with

Petitioners in furtherance of the conspiracy in January, March and July of 1971 were not included as overt acts; and (3) the period of the conspiracy was shortened to exclude those meetings. Moreover, a companion one count indictment was returned in No. 1796-72 against only Crook, which recited verbatim the allegations of the first count of the original indictment. In effect, the first superseding indictment charged one conspiracy with only Petitioners as co-defendants, and the second superseding indictment charged the same conspiracy with only Crook as the defendant; the Government did not disclose that the sole purpose for the delay and reindictment was to benefit its investigation of another criminal matter through the use of Crook.

Confronted with two indictments which on their face charged the same conspiracy, the court entered an order on September 19 consolidating the conspiracies in both new indictments for trial, and in an attempt to make the consolidated counts more manageable and in recognition of the special rules of evidence relating to perjury, severed the eleven perjury counts.

Petitioners prepared for the forthcoming pretrial on October 25, one week before the scheduled trial, still without knowledge of the Government's deliberate misrepresntation and deceit, and filed motions during the period asking the court to reconsider its order consolidating the conspiracy indictments. The court, also without knowledge of the Government's maneuvering, denied those motions on October 4. The trial was estimated by all parties concerned to require 4 to 6 weeks of time.

On the afternoon of the pretrial hearing, one (1) week before the scheduled trial of the consolidated con-

spiracy and false statement charges the Government moved to dismiss all charges against the Defendant Crook and stated:

> "Your Honor, in these criminal cases, due to the cooperation of the Defendant Harold Crook in a matter which is totally unrelated to the activities of any of the other seven Defendants in this case, totally unrelated to the activities of these seven Defendants in any area, the Government would at this time move to dismiss the counts against Harold Crook that are in this indictment as to Harold Crook and only as to him." (Tr. Oct. 25, 1972, p. 4)

Subsequently, during the course of the pretrial, Petitioners learned of Crook's cooperation and the real reason behind all the delay and the hoax of the superseding indictments. It was now clear that the court and Petitioner's counsel had been misled throughout months of maneuvering and had been merely performers in a ceremonial dance; that the Government had long before made an agreement with Crook not to bring him to trial, and did not intend to go to trial on the conspiracy and false statement charges against the Petitioners on November 1st. The superseding indictments had been returned only to conceal the maneuvering of the United States Attorney for the purpose of obtaining a delay for the Government's benefit in an unrelated criminal matter and the representations made on July 28 as to the reason for a continuance of the September trial date had been a deliberate hoax to the court and Petitioners.

The court took under consideration the written and oral motions of the Petitioners to dismiss, and the fol-

lowing day announced its decision which is quoted here in part:

> "THE COURT: I think it would be an appropriate time to announce the decision I have made with respect to how we will proceed with respect to the matters that were presented to the Court yesterday. As I am sure you all know, there are times when an issue arises in the course of the regular criminal business of the Federal Court when a Judge must act specially to preserve the integrity of the processes he administers from day to day, and I believe such an issue was tendered in this case at pretrial yesterday.
>
> After obtaining continuances of the trial date, the United States Attorney moved yesterday to dismiss perjury and conspiracy charges against the lieutenant on the ground he has cooperated with the United States Attorney in developing information concerning gambling and corruption in return for which he has been promised dismissal of two indictments pending against him, and has been assured that no administrative action will be taken to affect his pension or other rights. No superseding or different indictments have been lodged against him.
>
> This oral motion, in which the lieutenant's counsel jointed, was made at final pretrial and only a week before trial. . . .
>
> Defendants object on several grounds. They note that the Government lacked candor in making representations to gain the last continuance, that their trial plans have been disrupted by this last-minute development, that the lieutenant's attorney, who also represents one of the police subordinates, is in a conflicting position—perhaps necessitating his last-minute withdrawal—that the Grand Jury process has been abused by the United States Attorney in obtaining a smokescreen in-

dictment against the lieutenant which the Government acquired for its own benefit but never intended to prosecute, and that there is now an obvious need for further discovery and investigation into the conduct of the Grand Jury and other matters—all of which will further delay the scheduled conspiracy trial to the continued prejudice of the defendants remaind for trial.

These are justifiable complaints and have substantial merit.

• • • • • • • • •

As to the status of the other defendants, it equally clear that Rule 48(b) recognizes the Court's inherent power to dismiss charges on the facts now before the Court, and affords more far-reaching protections than pure constitutional guarantees. (Mann v. United States, 113, U.S. App. D.C. 27, 304 F.2d 394, cert denied, 371 U.S. 896 (1962), which has made this point quite clear, and there is also the necessity to protect other compelling public interests for reasons which are well set forth in United States vs. Mark II Electronics of Louisiana, Inc., 283 Fed. Supp. 280 (E.D. La. 1969).

In weighing the interests involved in this case, the Court has looked to the factors of length of the delays, the Government's purposes for and the benefits from the delays, the defendants' assertion of their rights to speedy trial, and the prejudice incurred by the defendants, both in their defense of these charges and their posture in the community. These are standards which the Supreme Court has emphasized in Barker vs. Wingo, 407 U.S. 514 (1972), and in Klopfer v. North Carolina, 386 U.S. 213, 222 (1967).

• • • • • • • • •

If the Court were to deny the motion to dismiss, a further delay of the trial into at least February is required. New counsel will be required for at

> least one of the defendants. Various motions would have to be processed and other adjustments made.
>
> The Government has disabled itself from going forward against any defendant on the consolidated conspiracy charges. Its maneuvering has deprived the minor defendants of a speedy trial of the conspiracy issues and this prosecution has been aborted by the prosecutor's conduct. Invoking Rule 48(b), therefore, all conspiracy charges against all defendants scheduled for November 1st trial shall be dismissed with prejudice, forthwith.
>
> In taking this action, the Court will act to assure that the more serious charges still pending against all these defendants are preserved and prosecuted.
>
> The Court has previously served for separate trial various counts alleging perjury. These counts will not be dismissed and will be tried promptly." (Tr. Oct. 26, 1972, pp. 2-8)

The court's response in the face of the Government's misrepresentation was measured indeed. Those counts in the consolidated cases which were not previously severed were dismissed and the Government was ordered to proceed with the perjury trials, beginning November 1st. (Order of Oct. 27, 1972; Tr. Oct. 26, 1972, p. 9)

On the following day the Government moved to stay the trial of the perjury counts set for November 1st due to the "differences of opinion, accusation and indeed some hostility" present on the preceding day. Petitioners objected and the motion was denied. (Tr. Oct. 27, 1972, pp. 10-13) The Government moved for a stay, again over objection, this time urging that the

perjury cases be continued until after the resolution of an appeal by the Government. (Tr. Oct. 27, 1972, pp. 19-25) When the court denied this motion the Government asked the court to recuse itself. This motion was granted and the November 1st trial date was finally set aside. The remaining perjury counts were reassigned to another judge of the District Court, and as of this date the matter has not been ruled upon and no trial has been scheduled.

The Government noted an appeal and the Court of Appeals, without opinion, on June 20, 1973 reversed the lower court's dismissal and reinstated all charges against Petitioners. A Petition for Rehearing, Rehearing *En Banc* was denied.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 20th, 1973. A timely Petition for Rehearing, Rehearing *en banc* was denied on July 16th, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254, and pursuant to this Court's general powers of supervision.

QUESTION PRESENTED

Whether a United States District Court under the provisions of Rule 48(b), F.R. Crim. P. and under its inherent power to protect the integrity of its own processes properly dismissed certain counts of an indictment when it discovered that the United States had, for its own selfish advantage, deliberately misrepresented to the Court and Petitioners the reasons for requesting a delay of trial.

REASONS FOR GRANTING THE WRIT

This Petition presents separate but intertwined reasons for granting *certiorari*. In dismissing the conspiracy and false statement charges against Petitioners, the District Court relied upon the provisions of Rule 48(b) F.R. Crim P. and its inherent authority to protect the integrity of the judicial processes from executive manipulation and enroachment. Both the court and Petitioners accepted the Government's representations in July 1972, that new indictments would be required because of an alleged variance between the expected proof at trial and the original indictment. The trial in this matter had previously been continued from June 12, 1972, to September 11, as a result of the illness of a government investigator and based upon the Government's representations in July, the September trial date for this four to six week trial was continued for a second time.

On October 25, one week prior to trial, Petitioners and the court learned the real reason behind the reindictment of Petitioners in one indictment, and Crook in another, for substantially the same alleged conspiracy. Crook's counsel related to the court that in exchange for Crook's assistance on an unrelated investigation the Government had agreed in late June or early July to dismiss all charges against him. The trial court recalled that Crook's counsel and the United States Attorney had met with him in chambers and disclosed the information with regard to Crook's cooperation and the fact that his undercover activities would not be complete by the September trial date. The court also noted, however, that the Government would have to disclose to Petitioners, the reason for a continuance of the September trial date if it wished

one. Rather than make such as disclosure, however, the Government at the July 28th pretrial falsely represented that a variance existed and for this reason alone the September trial date was continued.

When the superseding indictments were returned, the trial court perceived no difference in substance between them and the original indictment, and promptly consolidated the conspiracy and false statement charges into one unitary trial to commence on November 1st. The court did sever the eleven perjury counts, involving three of the Petitioners, for trial at a date after the mass conspiracy and false statement trial. After learning of the Government's deliberate misrepresentations, that the cases could not be tried on November 1st, and in all probability would not be tried before February 1973, and in the face of the Petitioners' repeated demands for a speedy trial throughout the proceedings, the court, in a well reasoned opinion dismissed those counts that had been set for trial on November 1st, under the authority of Rule 48(b) and its own inherent powers to maintain the independence and integrity of the judicial processes.

Rule 48(b) is a restatement of the inherent power of the court to dismiss a case for want of prosecution, Advisory Committee Note to Rule 48(b), and affords more far-reaching protections than pure constitutional guarantees. The prosecutor's duty under the Sixth Amendment to bring the case promptly to trial, *Dickey* v. *Florida,* 398 U.S. 30, 37-38 (1970), arises under Rule 48(b) not when the indictment is returned, but when the prosecution is begun, and although this Court declined to extend the Sixth Amendment right to a speedy trial to pre-indictment delay in *United States* v. *Marion,* 404 U.S. 307 (1971), the

Government conceded that the Due Process Clause of the Fifth Amendment "would require dismissal" if there was substantial prejudice and "the delay was a purposeful device to gain a tactical advantage over the accused." 8A Moore's Federal Practice, Sec. 48.03 (2), p. 48-27. See *United States* v. *Marion, supra,* at 325.

Responding to the issue of Rule 48(b) herein, the Court of Appeals characterized the Government's misrepresentations as "dilatory tactics" and noted that the return of the indictment on January 21st, 1972, to the third trial continuance on November 1st, was not of a sufficient length and delay to justify dismissal under the guidelines of *Barker* v. *Wingo* 407 U.S. 514 (1972). It further went on to note that the customary practice is to dismisss under Rule 48(b) without prejudice so as to permit the re-indictment of a defendant. The trial court, however, aptly noted that this four to six week trial could not be rescheduled until February 1973, at the earliest, that the misrepresentations had disrupted the court's calendar, deprived the Petitioners of a prompt trial date which they had all requested, and required Petitioner's counsel to prepare for an extensive trial that the Government knew would not occur. Had the trial court entered a dismissal without prejudice the Government would have been rewarded for its deceit with the additional time it determined to obtain in July 1972.

Certainly these Petitioners were no less subject to the infirmities of the pending prosecution than was the defendant in *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967), and were entitled to relief where there was demonstrated a totally unjustified and unnecessary delay in bringing them to trial for the Government's

sole benefit. To permit the Government through deceit to manipulate the Court's calendar and Petitioners right to a prompt trial without any judicial authority to remedy this abuse renders Rule 48(b) nugatory.

Equally, if not more important than the considerations of the application of the breadth of Rule 48(b) is the second prong upon which the trial court entered its Order of Dismissal. This Court has consistently ruled that the Government must be held to the highest standards of ethical conduct in the prosecution of criminal actions. The Government may not acquiesce in the use of false testimony by its own witnesses, *Napue* v. *United States,* 360, U.S. 264 (1959), withhold evidence favorable to the accused's post trial sentencing, *Brady* v. *Maryland,* 373 U.S. 83 (1963) or secrete evidence favorable to the innocence of the defendant, *Giles* v. *Maryland,* 386 U.S. 66 (1967). Neither may it, as in this case, deliberately lie to the Court in order to secure for its own advantage a more favorable trial at some distant date. As the Minister of Justice, the prosecutor has the duty to provide a prompt trial, *Dickey, supra,* at 37-38 and in discharging that responsibility:

> (a) A prosecutor should not intentionally use procedural devices for delay for which there is no legitimate basis.
>
> (b) . . .
>
> (c) It is unprofessional conduct intentionally to misrepresent facts or otherwise mislead the court in order to obtain a continuance. (A.B.A. Project on Standards for Criminal Justice, The Prosecution Function, & a.9, approved draft 1971)

Deviations from the standards established in this Court's prior decisions and in the Code of Professional

Responsibility, certainly fall within the general powers of supervision as specified in Rule 19(b), Supreme Court Rules. The judgment of the Court of Appeals, in essence, has approved without explanations the conduct of the Government at the expense of the Court's integrity and independence from the executive branch, even ignoring for the moment Petitioners' rights. In dismissing the charges against these Petitioners, the District Court attempted to preserve the basic separation of powers between the executive and judicial branches of Government and insure that its own processes remain with integrity, independent and above reproach. When the United States Government is permitted to deceive the Court and inferentially the Petitioners, and the court stands powerless to correct this abuse or refuses to acknowledge the gravity of the situation by characterizing the deliberate misrepresentations as "dilatory tactics" the judicary has by its own action made itself subservient to the executive branch of Government. The actions of the United States in this case have "departed from the accepted and usual course of judicial proceedings" and necessitate the exercise of this Court's general powers of supervision.

CONCLUSION

For the following reasons the Joint Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C. C.1795-72

UNITED STATES OF AMERICA

vs.

ROCCO CIANCIOTTI JR. ET AL

C. C. 1796-72

UNITED STATES OF AMERICA

vs.

HAROLD F. CROOK

Washington, D.C.
October 26, 1972

The above-entitled matter came on for pretrial hearing before THE HONORABLE GERHARD A. GESSELL, United States District Judge, at 4:45 pm.

APPEARANCES:

On behalf of the Government:
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On behalf of the Defendants:
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JOEL FINKELSTEIN ESQ.
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PROCEEDINGS

THE COURT: I think it would be an appropriate time to announce the decision I have made with respect to how we will proceed with respect to the matters that were presented to the Court yesterday. As I am sure you all know, there are times when an issue arises in the course of the regular criminal business of the Federal Court when a Judge must act specially to preserve the integrity of the processes he administers from day to day, and I believe such an issue was tendered in this case at pretrial yesterday.

Not surprisingly, the issue is unique—one for which no clear precedent exists. Accordingly, this calls for the exercise of discretion and, in this instance, an assertion of the Court's inherent power to protect against abuse of the enormous power traditionally vested in the United States Attorney under the doctrine of the separation of powers. A police lieutenant and seven of his subordinate officers have been indicted for conspiracy to effectuate false arrests and to falsify the circumstances of these arrests, both to judicial officers and the United States Attorney, for personal financial gain. These are serious and inexcusable breaches of public trust if the allegations are established.

After obtaining continuances of the trial date, the United States Attorney moved yesterday to dismiss perjury and conspiracy charges against the lieutenant on the ground he has cooperated with the United States Attorney in developing information concerning gambling and corruption in return for which he has been promised dismissal of two indictments pending against him, and has been assured that no administrative action will be taken to affect his pension or other rights. No superseding or different indictments have been lodged against him.

This oral motion, in which the lieutenant's counsel joined, was made at final pretrial and only a week before

trial. The reasons for this extraordinary largess were not further explained, and no information was presented to even suggest how this deal benefits sound law enforcement or protects the public interest. Indeed, orders were apparently issued by the United States Attorney sealing the lips of his designees appearing in Court.

Defendants object on several grounds. They note that the Government lacked candor in making representations to gain the last continuance, that their trial plans have been disrupted by this last-minute development, that the lieutenant's attorney, who also represents one of the police subordinates, is in a conflicting position—perhaps necessitating his last-minute withdrawal—that the Grand Jury process has been abused by the United States Attorney in obtaining a smokescreen indictment against the lieutenant which the Government acquired for its own benefit but never intended to prosecute, and that there is now an obvious need for further discovery and investigation into the conduct of the Grand Jury and other matters—all of which will further delay the scheduled conspiracy trial to the continued prejudice of the defendants remaining for trial.

These are justifiable complaints and have substantial merit.

The United States Attorney stands on his asserted right to dismiss, which he insists is absolute, leaving the Court without recourse but to accept his view of what is right. But this position is mistaken. The Court does not lack power to preserve an elementary standard of fair play and to protect against arbitrary exercise of asserted prosecutorial discretion—where that acts contrary to the public interest.

Because Rule 48(a) of the Federal Rules of Criminal Procedure has been approved by the Congress, review by the Court of the prosecutor's discretion is not a struggle for

power between the Judicial and Executive branches, threatening the constitutional separation of powers. Instead the Court is exercising appropriate review, prescribed as is commonly done by a co-equal branch of government—the Congress—over the faithful execution of the laws by the Executive. This has been made clear since the early decisions of the Supreme Court in 1868 of the Confiscation cases and more recently in Powell v. Katzenbach. The citation of the confiscation cases is 74 United States (7 Wall.) 454, 457 (1868), and Powell v. Katzenbach, 123 U.S. App.D.C. 250, 359 F.2d 234, cert. denied, 384 U.S. 906 (1966).

There are occasions, as has been cited here, "when the conduct of an officer of the executive branch becomes enmeshed in the judicial process, and the courts have the power and resulting duty to supervise that conduct to the extent (it) uses the judicial administration of criminal justice," because public confidence in the fair administration of justice in such a transcending value, citing Dixon v. District of Columbia, 129 U.S. App. D.C. 341, 394 F 2d 966, (1968), and an earlier decision, well reasoned by Judge Gasch of this Court, in United States vs. Paiva, 294 Fed. Supp. 742, 746 (D.D.C. 1969).

While as a practical matter it may be difficult effectively to order a prosecution by denying a motion to dismiss, the public interest still demands a careful judicial review of the grounds for such a motion. The considerations were carefully reviewed by an able Judge of the Southern District of New York in United States vs. Greater Blouse, Skirt and Neckware Contractors Association, 228 F. Supp. 483 (S.D.N.Y. 1964).

The larger public interest, not just the protection of a defendant involved, in the motion, is at stake. Courts have denied such motions because sufficient facts were not presented for the court to agree that the public interest war-

ranted dismissal. United States v. Becker, 221 F. Supp 950 (W.D. Mo. 1963), United States v. Shanahan 168 F. Supp. 225 (S.D. Ind. 1959), United States v. Doe, 101 Fed. Supp. 609, (D. Conn. 1951)

As to the status of the other defendants, it is equally clear that Rule 48(b) recognizes the Court's inherent power to dismiss charges on the facts now before the Court, and affords more far-reaching protections than pure consitutional guarantees (Mann. v. United States 113 U.S. App. D.C. 27, 304 F. 2d 394, cert denied, 371 U.S. 896 (1962), which has made this point quite clear, and there is also the necessity to protect other compelling public interests for reasons which are well set forth in United States vs. Mark II Electronics of Louisiana, Inc. 283 Fed Supp. 280, (E.D. La. 1969.)

In weighing the interests involved in this case, the Court has looked to the factors of length of the delays, the Government's purposes for and the benefits from the delays, the defendant's assertion of their rights to speedy trial, and the prejudice incurred by the defendants, both in their defense of these charges and their posture in the community. These are standards which the Supreme Court has emphasized in Barker vs. Wingo, 407 U.S. 514 (1972), and in Klopfer v. North Carolina, 386 U.S. 213, 222 (1967).

The Grand Jury concluded as recently as September 8 1972, that the police lieutenant conspired with the other defendants to defraud the United States by falsely and illegally arresting and charging persons who had not then committed any criminal acts, and by making and using prosecution reports containing materially false, fictitious and fraudulent statements, and by misinforming and misleading the United States Attorney in and for the District of Columbia, and his Assistants, and by willfully testifying falsely, under oath.

These general charges were particularized in detail. It is a travesty that he now goes free without penalty of any kind because he reveals that he engaged in other crimes while the United States Attorney presses prosecutions against underlings of lesser rank, and lesser involvement. The lieutenant's exoneration of conspiracy must carry with it exoneration of his confederates, for no court of conscience can tolerate such an uneven approach to justice. Care must be taken lest judicial officers too readily aquiesce in the cynicism of prosecutors who substitute manipulation of informers for impartial, even-handed application of the laws.

Particularly distasteful are bargains which exculpate those in high responsibility while prosecution of subordinates is carried forward. Here, the cynicism has reached particularly excessive heights for the lieutenant has not even been questioned concerning his participation in the matters to be tried, will not testify for the Government, and simply goes scot-free.

If the Court were to deny the motion to dismiss, a further delay of the trial into at least February is required. New counsel will be required for at least one of the defendants. Various motions would have to be processed and other adjustments made.

The Government has disabled itself from going forward against any defendant on the consolidated conspiracy charges. Its maneuvering has deprived the minor defendants of a speedy trial of the conspiracy issues and this prosecution has been aborted by the prosecutor's conduct. Invoking Rule 48(b), therefore, all conspiracy charges against all defendants scheduled for November 1st trial shall be dismissed with prejudice, forthwith.

In taking this action, the Court will act to assure that the more serious charges still pending against all these defendants are preserved and prosecuted.

The Court has previously severed for separate trial various counts alleging perjury. These counts will not be dismissed and will be tried promptly.

The Government's motion to dismiss the perjury indictment against the lieutenant, criminal No. 151-72, is denied. Federal Rules of Criminal Procedure 48(a), is invoked in this connection.

The charge that he testified falsely before the Grand Jury is not one that the Executive can abandon on the limited showing made. The Grand Jury is under the direction and control of the Court—the integrity of its processes must be preserved. No basis for dismissal has been shown.

The various perjury charges against the other defendants raise issues of fact that are not materially different from those involved under various overt acts alleged in the dismissed conspiracy charges scheduled for November 1 trial. Discovery is complete—counsel are prepared. There is no reason why some or all of these separate perjury trials cannot go forward commencing November 1. Any police officer other than the lieutenant who desires a prompt trial of the perjury charges can have his case promptly scheduled commencing November 1.

It is possible that several perjury counts involving several defendants can be conveniently and appropriately tried at one time. Counsel are directed to confer on these matters and report in open court at nine a.m. tomorrow morning so that a trial schedule for all outstanding perjury counts on which the Government is prepared to proceed can be immediately set.

All defendants shall be present. Plea dispositions, if any, will be considered at this time. The first perjury trial will begin November 1 at nine thirty a.m., and priority should be given cases involving those defendants who are

in suspended status as opposed to officers who have resigned from the Force.

In view of these rulings and conclusions, the written and oral motions to dismiss the conspiracy charges are granted in Criminal No. 1795-72. The indictment in No. 1796-72 is dismissed. The application of counsel for Lieutenant Crooke and Goulart to be relived is denied, and it is so ordered.

I believe, gentlemen, that this is the only appropriate step or series of steps that can be taken and I expect a realistic and effective schedule to be presented by counsel by Nine o'clock in this courtroom tomorrow morning.

CERTIFIED

JOAN CURTIS BLAIR, C.S.R.
Official Court Reporter

[Filed October 27, 1972]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 1795-72

UNITED STATES OF AMERICA

v.

ROCCO CIANCIOTTI, JR., ET AL.

Criminal Case No. 1796-72

UNITED STATES OF AMERICA

v.

HAROLD F. CROOK

Criminal Case No. 151-72

UNITED STATES OF AMERICA

v.

HAROLD F. CROOK

Order

For the reasons stated by the Court at the hearing in this matter on October 26, 1972, it is hereby

ORDERED, that those counts in the indictment in Criminal Case Number 1795-72 which were not previously severed by this Court are hereby dismissed; and it is

FURTHER ORDERED, that the indictment in Criminal Case Number 1796-72 is hereby dismissed; and it is

FURTHER ORDERED, that the Government's motion to dismiss the indictment in Criminal Case Number 151-72 is hereby denied.

/s/ Gerhard A. Gesell
Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

September Term, 1972

No. 72-2133

UNITED STATES OF AMERICA, Appellant

Criminal No. 1795-72
Criminal No. 1796-72

v.

ROCCO CIANCIOTTI, JR. *et al.*

Appeal from the United States District Court for the District of Columbia.

Before: WILBUR K. MILLER, Senior Circuit Judge, and WRIGHT and ROBB, Circuit Judges.

Judgement

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

This appeal is from the dismissal by the District Court of indictments in which appellees were named as defendants. The original indictments in this case (later superseded by the indictments in suit, Nos. 1795-72 and 1796-72) were returned on January 21, 1972, and the case was set for trial on June 12, 1972, from which date it was continued because of the illness of an important witness. The superseding indictments were returned on September 8, 1972, and trial thereon was set for November 1, 1972. On October 26, 1972 at a pretrial hearing, after a disagreement with the prosecution as to dismissing certain counts in one of the original indictments as to one defendant not an appellee here, the District Court, "invoking Rule 48(b), [Fed. R. Crim. P.]," dismissed both indictments with prejudice as to all defendants, including appellees, as to all counts not previously severed.

Rule 48(b) authorizes the District Court to dismiss an indictment "if there is unnecessary delay in bringing a defendant to trial." Considering the fact that appellees were free without bail pending trial, the complicated character of this litigation, and the fact that *the only continuance* of trial was caused by the illness of a necessary witness, from January 21, 1972 to November 1, 1972 is not such delay under the constitutional guilelines of *Barker* v. *Wingo*, 407 U.S. 514 (1972), as would justify dismissal of these indictments. We have held, however, that the District Court's power under Rule 48(b) "is not circumscribed by the Sixth Amendment [guarantee of speedy trial]." *Mann*

v. *United States,* 113 U.S. App. D.C. 27, 31, 304 F.2d 394, 398, *cert. denied,* 371 U.S. 896 (1962). But in the circumstances of this case, the "plight of the accused" occasioned by the Government's allegedly dilatory tactics, *see ibid.,* was simply insufficient to justify the exercise of the District Court's power under Rule 48(b). Our belief that the District Court abused its discretion—the proper test for review of decisions on Rule 48(b) motions, *United States* v. *DeLeo,* 1 Cir., 422 F.2d 487, 495, *cert. denied,* 397 U.S. 1037 (1970)—is further supported by the fact that the ordinary practice where, as here, dismissal under Rule 48(b) is granted on non-constitutional grounds is to permit the prosecution to re-indict the defendant, and not to dismiss with prejudice, at least where prejudice to the defendant is not shown. *See United States* v. *Mark II Electronics of Louisiana, Inc.,* E.D. La., 283 F.Supp. 280 (1968).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the order of the District Court dismissing those counts in the indictment in Criminal Case No. 1795-72 which were not previously severed and dismissing the indictment in Criminal Case No. 1796-72 be, and it is hereby, vacated and set aside.

Per Curiam

For the Court

HUGH E. KLINE
Clerk

By: ROBERT A. BONNER
Chief Deputy Clerk

Order

On consideration of appellees' consolidated petition for rehearing, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam

For the Court:

HUGH E. KLINE
Clerk

Senior Circuit Judge Miller did not participate in the foregoing order.

No. 73-304

OCT 19 1973

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROCCO CIANCIOTTI, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-304

ROCCO CIANCIOTTI, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOA A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On January 21, 1972, indictments against petitioners were returned in the United States District Court for the District of Columbia. Petitioners, who were members of the Metropolitan Police Department, were charged with perjury, false statements, and conspiracy. Superseding indictments, charging substantially the same offenses, were returned against petitioners on September 8, 1972.[1] Trial was set for November 1, 1972. On October 26, 1972, however, the district court dismissed the conspiracy and false statement indictments with prejudice, on the grounds that there had been unnecessary delay in bringing petitioners to trial

[1] Lieutenant Harold F. Crook was named as a co-defendant in the first indictments; he was charged separately in the superseding indictments. The theory of conspiracy was correspondingly changed from a "wheel" conspiracy, with Crook at the hub, to a "chain" conspiracy among petitioners acting in concert together.

under Rule 48(b), Fed. R. Crim. P., and that the government's failure to prosecute a superior officer allegedly involved in the conspiracy constituted a prosecutorial abuse that could only be remedied by dismissal of the charges against petitioners (Pet. App. 1a-8a). The court of appeals, in a *per curiam* opinion, vacated and set aside the district court's dismissal order, holding that the district court had abused its discretion in dismissing the indictments where there had been no showing of prejudice to petitioners (Pet. App. 10a-12a). Petitioners here renew their claims of unnecessary pre-trial delay and prosecutorial abuse.

1. There is no claim here that the pre-trial delay violated petitioners' Sixth Amendment right to a speedy trial. The length of time between the original indictments and the scheduled trial date was less than ten months. The delay was occasioned by several factors, including the need to conceal an independent investigation in which one of petitioners' co-defendants was cooperating, the illness of an important government witness, and a change in the theory of conspiracy which made reindictment advisable. Thus the court of appeals held, and petitioners apparently agree (Pet. 14), that dismissal of the indictments could not be justified under *Barker* v. *Wingo*, 407 U.S. 514.

At most, these factors delayed trial from June 12, 1972, the original trial date, to November 1, 1972. Petitioners make no showing of specific prejudice resulting from such delay. Thus, even though Rule 48(b) may permit the district court in the exercise of its discretion, to dismiss an indictment in some instances where the delay is not of such magnitude as to jeopardize the constitutional right to a speedy trial, there was no basis here for the exercise of that discre-

tion.[2] The court of appeals determination to that effect warrants no further review.

2. Petitioners contend that the government's failure to prosecute their superior officer, Lieutenant Harold F. Crook, warrants dismissal of their own indictments. But, after his indictment, Crook cooperated with and assisted the prosecution in a wide-ranging investigation into corruption in the municipal police force. As a direct result, an additional twenty-two indictments have been returned involving several more police officers. In return for this assistance, Crook was in effect granted immunity from further prosecution. The grant of such immunity is, of course, an important tool in investigations against crime, and its use should not be hampered or discouraged by judicial extension of immunity to non-cooperating defendants such as petitioners. The government's decision not to prosecute Crook should have no bearing on petitioners' liability for trial, and the court of appeals properly so decided.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[2] Indeed, Rule 48(b) permits dismissal of indictments only where there has been "unnecessary" delay on the part of the prosecution. Under the facts of this case, we submit that the delay was clearly justifiable, and the district court was thus without power to dismiss the indictments. Moreover, as the court of appeals noted (Pet. App. 12a), any dismissal should be without prejudice to reindictment unless the defense has been (as it was not here) harmed by the delay.

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